ANNUAL ADDRESS

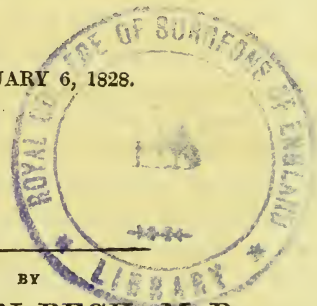
DELIVERED BEFORE 9.

THE MEDICAL SOCIETY

OF THE

STATE OF NEW-YORK.

FEBRUARY 6, 1828.



BY

T. ROMEYN BECK, M. D.

PRESIDENT OF THE SOCIETY.

Corresponding Member of the Medical Society of London ; the Linnæan Society of Paris ; the Society of Natural History, Montreal ; the Academy of Natural Sciences, Philadelphia, and the Lyceum of Natural History, New York. Honorary Member of the Medical Society of the State of Connecticut ; of the Medical Society of Emulation at Charleston, (S Carolina,) and of the West-Point Lyceum of Natural History. Member of the American Geological Society; the New-York Historical Society, and the Albany Institute.

ALBANY:

PRINTED BY WEBSTERS AND SKINNERS.

1828

Digitized by the Internet Archive
in 2016

https://archive.org/details/b22485351

ANNUAL ADDRESS.

MR. VICE-PRESIDENT, AND
GENTLEMEN OF THE SOCIETY,

THE honourable office to which I have been called by your suffrages, imposes on me the duty of addressing you. I enter upon it with a proper sense of its responsibility, and an anxious, though it may be a fruitless wish, that I may not diminish the reputation which similar productions of my esteemed predecessors have acquired for us. Among those who have formerly filled the office of President of this Society, are to be numbered men of powerful intellect—of unwearied public spiritedness—venerable for their useful lives, and entitled to the gratitude of the profession and the public, for their exertions to diffuse the benefits of our science, and to raise its disciples to that station to which its liberal studies entitle it. I can only hope for a participation in the last of these qualifications—an anxious wish to elevate the character of our common profession.

Amidst the multiplicity of subjects that present themselves for selection, and which might with propriety be noticed at this time, I have ventured to choose one, which I trust will commend itself to your attention. While its connection with those branches of medicine to which I have particularly devoted myself, enables me to speak of it with more freedom, it will not be deemed unworthy of your notice, as it embraces not only the interests of the profession, but of the community in general. I refer to the subject of MEDICAL EVIDENCE in courts of justice.

Besides the ordinary, but responsible and most interesting duty of attending the sick, the physician and surgeon is often called upon to exercise other functions. His opinion is often desired on cases of sudden death—of grievous

bodily or mental injury—or on the nature of particular diseases and affections. This indeed was the natural result of a regard to the interests of society. As the importance of equal laws became more fully recognized, and the necessity of distributing impartial justice was more fully understood, it would soon suggest itself to the legislator, that whenever evidence was required, it should be of the most unexceptionable and decisive kind. When the controversy originated in mercantile disputes, the opinions of merchants were of course sought for and depended on; and their customs and usages have become a part of the statutes of various countries. So also when unexpected death followed from known or supposed injury—when the suspicion of violence entered into the list of causes, it was natural, that sooner or later, those should be called upon to examine and testify, whose ordinary studies and pursuits best enabled them to decide. We find that it is now nearly three centuries since a formal enactment in a European code recognized this principle.—The emperor Charles the Fifth, the most powerful, and probably the most talented monarch of his day, in the celebrated criminal code, framed by him at Ratisbon, in 1532, ordained, that the opinion of medical men should be taken in every case where death had been occasioned by violent means—such as child murder, poisoning, wounds, hanging, drowning, and the like.

France and other continental countries soon followed this example, and improved upon its directions. In England, the country from which we derive our laws, no formal statutory provision on this subject is, I believe, to be found; but custom has sanctioned what the necessity of the case rendered imperious—an appeal to medical testimony. Yet it cannot be denied, that this appeal is still avoided as often as public sentiment will permit, and even when legally ordered, its proper objects are often thwarted or imperfectly accomplished. The principle, however, is recognized and must often be acted upon both there and in this country. It then becomes a most interesting question, how it shall be best performed for the furtherance of the ends of justice—in punishing the guilty and rescuing the innocent—how the obstacles to its proper knowledge shall be best obviated—and how the difficulties that attend its execution may be lessened or removed.

In cases of violent death, and these are the most important, as well as the most common, in which professional witnesses are summoned, their duties may be considered under two divisions—first, before the coroner's inquest, and secondly, before the court and jury that is to try the supposed criminal. In other words, the facts that are to govern, are elicited before the former, while before the latter, these facts are to be stated and opinions are to be advanced, which frequently decide the fate of the accusation. This is the ordinary mode of judicial proceeding, though of course it is often necessary to pronounce an opinion even before the coroner's jury, but with the important distinction, that its merits and weight are there seldom canvassed.

The office of coroner is a very ancient and certainly a very important one. It enters into the very essence of his duties, and those of the jury whom he summons, to *view the body*. He is to enquire into the causes which have produced the supposed violent termination of life; and if the injury be manifest, to ascertain its nature and the probable instrument used to effect it. In the discharge of this function, he *may* summon any medical man before him as a witness. That he *should* do it, in every case which admits of the slightest doubt, would seem equally proper and just. Here, however, a discretion is often exercised, the result of which proves injurious—sometimes by permitting a guilty person to escape, but more frequently by introducing a degree of carelessness and hurry in those investigations which are attended by physicians. In some countries, this discretionary power is destroyed. In Austria, though a despotic country, a highly laudable care is exercised by the government over its subjects. All bodies found in suspicious circumstances, are required to be examined, reports are demanded from the medical inspectors, and to aid them in their duties, a code of regulations has been prepared and circulated throughout the empire, according to which all are to proceed.* This, indeed, is as it should be. None but medical men can be supposed sufficiently capable of judging decisively of the nature of the case. They are best qualified to separate accidental circumstances from those

* Quarterly Journal of Foreign Medicine and Surgery, 1. p. 40.

indicative of violence, and they can best explain and illustrate the variety of natural causes, which in doubtful situations, have led to suspicion.

Returning, however, to the consideration of those instances where medical evidence is legally demanded, it remains to consider the *powers* and *duties* of the professional witness. It should be understood that he is to satisfy himself as to the *cause of death*. He is to proceed to a dissection, if he entertains the slightest doubt ; and he has the right to demand this, or, as an alternative, to deny his testimony.† At the present day, physicians at least, need not to be told that an external view alone of the body is perfectly nugatory ; that it can lead to no certain deductions, and that a jury is quite as competent to form an opinion upon it as the best instructed practitioner. If it be the duty of judicial officers to obtain in all cases, the *best* evidence in their power, surely the necessity of medico-legal dissections will not be denied.‡

The *duties* required cannot be satisfactorily or conscientiously discharged without competent knowledge. An acquaintance with anatomy is indispensably necessary, and peculiarly so in those interesting cases, where it is necessary to distinguish the effects of disease or violence from ordinary appearances. Unless well grounded in that science,

† London Medical Repository, 24. 578. It has been doubted, whether in point of law, it is *imperative* on a coroner to have the body opened. This however is of little practical importance, when we know he cannot *prevent* it, if demanded by competent persons, viz. medical witnesses.—His jury is sworn " diligently to enquire and true presentment make," *how and in what manner*, the deceased came to his death. Medico-Chirurgical Review, 6. 562.

‡ I copy the following note of the editor of the Edinburgh Medical and Surgical Journal, from its intimate bearing on the subject. It will be understood as applied to Great Britain.

" We cannot omit this opportunity of expressing our disapprobation of " the conduct of coroners, who presume to interrupt the medical practi- " tioner, called upon to examine the cause of death under suspicious cir- " cumstances ; and of informing practitioners in general that, as soon as " the body is delivered over to them for that purpose, they are to proceed " deliberately with their examination until they be satisfied Upon this " subject, we quote with great satisfaction, the opinion of the enlightened " judge who now presides over the criminal court of this division of the " empire. Dr. Cleghorn of Glasgow, having been examined in a trial for " poison, the Lord Justice Clerk, after highly complimenting the learned " professor, on his luminous evidence, *took occasion to impress strongly on " all magistrates and public officers present, the absolute necessity of having " the body of the deceased opened and examined by a medical man, in every " case of suspicious death.*" Edinburgh M. & S. J. 14. 468.

the phænomena that follows natural death may be mistaken for the effects of poison ; and in illustration of this, I need only refer to the changes induced by perforation of the stomach, and the variety observed in the vascularity of that organ. Anatomy, then, both physiological and pathological, must be applied to the case. Nor is this always sufficient. If the question of poisoning be agitated, chemistry is required to lend its aid.

None, I presume will question the correctness of these remarks. Let us not then hesitate to make the proper application. The members of our profession in every part of the country, are liable to be summoned, and that on the shortest notice, to take a part in such investigation. Are they—are we—qualified to do justice to them ? For myself, I am ready to say, that alone I could never with a free mind undertake a dissection and afterwards appear in court, and give a decisive opinion on the phænomena observed. Others will readily add that their knowledge of chemistry is not sufficient for making the required experiments. It cannot indeed be otherwise. Medical men are constantly engaged in a most laborious and engrossing occupation—after obtaining their education, their opportunities for pursuing practical anatomy are extremely narrow. Indeed the prejudices of the community, strengthened by the restrictions and penalties of our laws, render it almost impracticable to do more than preserve their early information. The accessary sciences also are only cultivated by a few. Does it not then appear that a duty is required, which in many cases should rather be avoided ? I am still confining myself to the preliminary investigation before a coroner, and need only allude to the additional force of these observations when the examiner is transferred to the stand of the witness, and subjected to the inquiries of the bar and the court. How often is a fair reputation and great social worth tarnished by such an event. And would not all prefer having some regulations adopted by which the liability to these appeals might be avoided ?*

* The fact cannot be too distinctly stated, that a *man may be a judicious, correct and excellent practitioner of medicine, and yet not competent as a witness.*

I have no novel proposition to offer on this subject. It is one that has been sanctioned by the experience of several continental countries, and has certainly led to the distribution of equal justice. It has done more. In the opinion of competent judges, it has led to the diminution of crimes, evidently from an apprehension of the certainty of their detection. I refer to the appointment of medical men in a county, a district, or a part of the state, who shall be specially charged with this duty.

The first germ of this regulation appears in the German code which I have already noticed. It has for centuries, been the practice in Austria to appoint individuals to superintend these examinations and to report on them. In 1606, the illustrious Henry the Fourth of France, gave letters patent to his first physician, by which he conferred on him the power of appointing two surgeons in every city and important town, whose duty it should exclusively be to examine all wounded or murdered persons, and to report thereon. It was soon discovered that in many instances, the investigation would be incomplete, unless physicians were associated with them, and accordingly in 1692, this was ordained by the council of state.† The form of the reports to be made by them, and the circumstances to be noticed, make a part of every work now published on the continent, concerning legal medicine.

The advantages of thus designating individuals would seem to be striking and prominent. It would lead to more accurate study of the science. It would afford numerous and favorable opportunities of improving it. It would in a great degree, prevent that disputation about facts, which produces so many unpleasant collisions in courts of justice. It would spare to many, the performance of the most unpleasant duties, often amidst the circle of their practice, and hence liable to injure its extent or impair its usefulness. At present, under existing laws, all are liable to be summoned, yet as the calls to duty are rare, many neglect to prepare themselves. But under a different order of things, the incumbent, if assigned to a sufficiently large district, would be aware that his aid would be frequently required, and

† Foderè Medecine Legale, Introduction, vol. 1. p. 32.

he would properly qualify himself for the task. He would also appear in a judicial capacity and in the discharge of his appointed duty, and would not be looked upon with that evil eye, which not unfrequently follows for years the physician, who it is insinuated, might have avoided the inquiry concerning the life of a neighbour.

It speaks something for the suggestion which I have made, that even in England, wedded as they are to their institutions, and averse to borrow from other countries, a wish has sometimes been breathed in its favour by some of her writers.*

It may however be urged, that the time has not yet arrived for such an arrangement. If so, and we are to proceed according to former customs, it certainly appears necessary that examinations of the dead should be made with great deliberation and accuracy. And nothing can be more conducive to this end, than that two or more professional men should be associated together. They will assist each other not merely mechanically, but by suggesting various points of inquiry. While he, who is most skilled in anatomy, is pursuing his dissection, the other may note the appearances as they successively present themselves—and the same course may be adopted while performing chemical experiments. The advantage will thus be attained, of having a complete account prepared at the moment of observation, which may be afterwards reviewed both in coming to a decision on the case and in giving evidence before a jury. We all recognize the utility of discussion, in enabling us to weigh the merits of conflicting arguments, and the application of this may prevent many regrets, as well as prepare the mind for any difficulties that may be suggested. It should be recollected, that the opinion of a medical man before a coroner's jury, may consign an individual to a prison for months and heap on him the imputation of the most horrid crimes. How necessary then that his decision be strongly fortified by facts and by authority.

* "It is impossible to resist the wish that special qualifications were required by law on the part of medical witnesses. There is something of this nature on the continent, and though one of the last of my countrymen who would wish to see the customs and institutions of Great Britain shaped according to foreign patterns, yet I think we might in some matters take a hint from and improve upon their practice." *Dr. Gordon Smith on Medical Evidence*, p. 103.

When the examination before the coroner is completed, and the charge of guilt is made, the duties of the witness are only half completed. He has to appear before another tribunal—to state the facts noticed—the opinion deduced from these facts and the reasons for that opinion. He may and indeed frequently is called upon to defend them from the objections of other medical witnesses; and above all, he has to undergo a severe and minute inquiry by gentlemen of the bar, whose business it is, to invalidate, if possible, all that he has said.

This part of our subject cannot be approached without adverting with some feelings of professional pride, to the certainty which has been attained, in many branches of medical jurisprudence. It is surely no mean exertion of human skill to be brought to a dead body—to examine its morbid condition—to analyze the fluids contained in it—(often in the smallest possible quantities) and from a course of deductions founded in the strictest logic, to pronounce an opinion, which combined circumstances, or the confession of the criminal, prove to be correct.* All this, if properly done, must be accomplished without listening to rumour and without permitting prejudice to operate. Many, again, have saved the innocent, by showing that accidental or natural causes have produced all the phænomena. And at this time, throughout Europe, and I may say in this country, there is a numerous band of men who are adding new facts to what we have acquired from former ages—corroborating what was established—simplifying what was complex, and establishing order and exactitude throughout the study.

The first point worthy of recommendation is the importance of stating the facts observed, in plain and perspicuous language. The use of technical terms is often unavoidable, and precision and accuracy must be sacrificed, if they be not adopted. But there is a medium in all this. Many

* "It is such duties ably performed, that raise our profession to an exalted rank in the eyes of the world; that cause the vulgar, who are ever ready to exclaim against the inutility of medicine, to marvel at the mysterious power by which an atom of arsenic, mingled amidst a mass of confused ingesta can still be detected. It does more: it impresses on the minds of assassins, who resort to poison, a salutary dread of the great impossibility of escaping discovery." Quarterly Journal Foreign Med. and Surgery, vol. 4, p. 45.

parts can be named by their common appellations, and the appearances observed designated by words in ordinary use. The imputation of pedantry is thus avoided and every aid is given to a clear understanding of the case. The doctrine founded on the facts, should next be mentioned in an unequivocal manner, so as at once to evince the decided belief of the individual in it and the reasons on which it is established. This becomes the more necessary from the looseness with which some of the most important subjects that can come before criminal courts have of late years been treated, both by the bench and by medical witnesses, in Great Britain. Fluctuations of opinion have appeared, that would, if carried to the extent of which they are susceptible, destroy all certainty in medical evidence. I allude particularly to questions of infanticide and insanity.

It is evident that the charge of infanticide cannot be brought, unless it be previously ascertained that the child was born alive. For several centuries, a decisive proof of this was supposed to be attained in the various phænomena exhibited by the lungs, and particularly their floating in water. No subject has been so thoroughly examined by means of experiments as this. But it was the bad fortune of the hydrostatic test (as it is called) to find an enemy in the late Dr. William Hunter,—a man of the greatest eminence in his profession—of no mean talents independent of his professional acquirements, and gifted with a fascinating mode of explaining and enforcing his opinions. He formed an idea that too implicit a reliance on this test might lead to error—that many circumstances might occur to weaken its value, and indeed that other causes besides respiration might produce the particular sign that was deemed indicative of independent life. The melancholy situation of those who were most liable to be charged with the crime of child-murder, gave an adventitious weight to his objections, and they formed the theme of every advocate for the unfortunate female who had fallen from virtue.

In themselves, they are worthy of due consideration, and on the continent, though not altogether original to its students, they led to new investigations, by applying which all the causes of fallacy might be avoided, while subsidiary proofs were furnished, strengthening the primary and leading one.

This however seemed to have but little influence in England. Few men dared, in the infancy of legal medicine, to question the opinions of Dr. Hunter, and though he evidently had paid little attention to the point experimentally, yet his dictum was quoted as the standard of medical science. In process of time, some of the barristers of that day, have ascended the bench, and carrying with them the ideas acquired at the bar, have on many occasions, denounced the hydrostatic test. Baron Garrow some years since, at the Worcester assizes, congratulated a grand jury, that that *scientific humbug* (as he styled it) was abandoned. Nothing he added, could be more fallacious.* Justice Littledale, in a late trial, told the medical witness, "You do not appear "old enough to have seen the late Dr. Hunter, but you "must know that he was one of the most celebrated sur- "geons of this country, and that he asserted that no depen- "dence was to be placed on the test you rely on." It was answered, "I am aware that was his opinion, but I enter- "tain a different one, and I believe mine is now the receiv- "ed theory among medical men." "Then it must be (said "Justice Littledale) within the last year or two if it is, for "I have heard some of the most eminent of them deny it." And so is the fact. Physicians are not sufficiently firm in expressing their sentiments. They are too apt to yield to

* Newspapers and Edinburgh M. & S. Journal, vol. 19, 450. I must be permitted to put the following anecdote of Baron Garrow, in connection with the above specimen of his medical knowledge. "When at the bar, Garrow was much more famed for his skill in cross examination, than for his legal knowledge. Many ludicrous stories are told of his deficiences in the latter particular, among which, the following is not the least droll. Once upon a time, having occasion to appear at the bar of the house of lords, upon a question requiring some rather difficult research, Garrow requested a learned friend to furnish him with authorities upon the subject. This his friend did, but unluckily for Garrow, instead of referring to the reporters and writers, by their names at length, he referred to them as is usual in writing, by their abbreviations—so that when the learned barrister, who was not conversant with either, had to quote 1 Cowper's Reports (written 1 Cow.) for example, he desired the house to look into one cow for the law—for the 2d Bulstrode (written 2 Buls.) he triumphantly cited two bulls for one cow. He spoke of a crow, and he adduced two kids (for 2 Kid) in support of his argument. The noble lords stared and marvelled exceedingly what had given so bucolic a turn to the attorney general's discourse, while the lawyers, who perceived his mistake, laughed at the blunder, but Garrow never suspected what was the cause of the astonishment of one half of the audience and of the mirth of the other. He rested perfectly assured that his cows and bulls and crows and kids were the names of excellent authorities, and seemed well satisfied with himself for the learning and research he had displayed." London Magazine for March 1826, p. 375.

the decisive tone that is adopted and permit doubts to escape them, when those doubts should apply only to the proper performance of the test, or to adventitious circumstances impairing its certainty.*

All this however cannot shake the validity of the test. It is founded on physiological principles, deduced from the broad and wide distinctions that exist between fœtal and independent life. Its prominent proof is strengthened by numerous accessary ones, such as the test of Plouquet, the changes in the heart and large blood vessels, and the appearances observed in the various viscera.† The common sense of mankind, we might suppose, would teach all, that these *must* occur from so important a change to the new-born infant, and all anatomical knowledge is a mockery, if they be not founded in truth. Even allowing full weight to the scientific objections that have been made, they only

* In a case tried at the Essex assizes in March, 1820, where the circumstances were evidently extremely suspicious, and where the lungs were found to float, the counsel for the prosecution, the surgeon who examined them, and the judge on the bench, all agreed that it was a fallacious test. The judge (the Chief Baron) said there was no proof that the child was born alive. Again in a case tried in Scotland, three medical witnesses, *who had not seen the body*, were examined for the prisoner and all of these gentlemen agreed, that if the child had been dead for the period of eleven days, it was impossible for any medical man to come to a conclusion as to whether the child had been alive at the time of birth. Edinburgh M. & S. J. 21, 231. The remarks of the journalist on this testimony are so pertinent that I cannot forbear quoting them. "The more we turn our attention to "the subject, the firmer is our conviction—and in this conviction, we are "borne out by every one of the few persons in this country entitled to the "name of medical jurists—that to procure a satisfactory and irrefragible "opinion in cases of infanticide and in all other difficult medico-legal ques- "tions, it is only requisite to submit the matter to a dispassionate and skil- "ful investigation. Those little acquainted with medical jurisprudence, "whether professional or unprofessional, universally confound together "*doubt* and *difficulty*. The question involved in the trial, must be allowed "to be almost always difficult, but we are certain, that when properly ex- "amined, scarcely one instance in a hundred will prove doubtful."

I add the following extraordinary case, to show how far judicial interference has been carried. The infant was found dead in a box, with several wounds on its neck and breast, and marks of injury to the skull. The lungs were distended with air, and they, with the heart attached, floated in water. The mother had been delivered alone a few hours previous, but denied it. On the trial, the medical witness, Dr Robinson of Bridport, was not allowed him to state his experiments on the lungs, and the judge (Baron Garrow) interrupted the counsel for the prosecution to state to him that the test was a vulgar error. London Med. Repository, 22, 347

† "The pulmonary test (says Ristelheuber) is no longer a simple trial, "whether the lungs are buoyant or not, though this phænomenon is of high "importance and great value in the estimate, but it consists moreover in ex- "amining the thorax, the lungs, and indeed every part that undergoes a "change in consequence of respiration." *Rapports et Consultations de Médecine Legale par J. Ristelheuber, p.* 140.

prove that there may be cases, where the test is not applicable. They cannot affect its general application.

The result however in England, of the fluctuations of opinion that I have noticed, is not surprising. It has become proverbial there, to say, that no female can be convicted of infanticide. This is also probably to be somewhat ascribed to the severity of the laws, which makes it a capital crime, and prescribes imprisonment for the concealment of the death of the offspring. Sir Walter Scott's "Heart of Mid-Lothian," gives an instructive picture of the barbarity that once disfigured the Scottish law. Such however is not the mode to repress crime. The certainty of detection probably does more to restrain the hand of the murderer than any other cause, and this can alone be attained by the application of the pulmonary test.

The subject of insanity deserves a brief notice, from the discrepancy that practically occurs between civil and criminal cases, and which often results from the employment of terms in legal works, that are either abandoned in medicine, or used in a different sense. One of these is the phrase —*a lucid interval.* Medical men have nearly abandoned it, since they know of no such state as was formerly intended to be expressed by it. The disease present in the insane, is to be taken as a whole. They are either labouring under it, or they are free from it. Quietness, orderly conduct, or even rational conversation, is not proof that they are rational; and this is the nature of the malady. When the raving paroxysm is over (and many have but few and short attacks of it) they will appear to the uninstructed observer, as of sound mind. They converse on all subjects, but one, with perfect propriety. Strike that key note, and all is disorder and confusion.*

* I delight to refer to the authority of that great luminary of French Jurisprudence, D'Aguesseau. His remarks are an admirable commentary on the medical experience of those excellent and gifted men, who of late years have superintended lunatic establishments in Europe and this country with so much success. "It is easy (he says) to remove the ambiguity "which they have endeavoured to introduce, by confounding a *sensible ac-* "*tion*, with a *lucid interval.* An action may be sensible in appearance, "without the author of it being sensible in fact, but an interval cannot be "perfect, unless you can conclude from it, that the person in whom it ap- "pears is in a state of sanity; the action is only a rapid and momentary "effect, the interval continues and supports itself: the action only marks a "single fact; the interval is a state composed of a succession of actions."
And again, "If it was true that a proof of some sensible action was suffi-

Now this would be of comparatively little importance in a public point of view, were not the legal interpretation of the term applied in criminal cases. It is not I believe, recognized in civil ones. There, there must be a perfect recovery, before property is restored.* But an action which when committed by a sane person, would be criminal, is deemed the same when perpetrated during the supposed lucid interval—or in other words, the individual is held answerable for his acts, if he possess a mind capable of distinguishing between right and wrong. This was the language of Sir Vicary Gibbs, the attorney general of England, and of Sir James Mansfield, the chief justice, on the trial of Bellingham, the murderer of Mr. Percival.† How is this to be ascertained? "If it should be presumed (says "Dr. Haslam) that any medical practitioner is able to pen- "etrate into the recesses of a lunatic's mind, at the moment "he committed an outrage; to view the internal play of "obtruding thoughts and contending motives—and to de- "pose that he knew the *good* and *evil*, *right* and *wrong*, he "was about to commit, it must be confessed that such knowl- "edge is beyond the limits of our attainment." "A per- "son in his senses may entertain and believe a number of "unfounded and erroneous opinions, but on the exposure of "their falsity, he is capable of being convinced; but the "madman never is, and this forms the great distinction be- "tween them. This incapability of being convinced of the

"cient to induce a presumption of lucid intervals, it must be concluded, "that those who allege insanity could never gain their cause, and that those "who maintain the contrary could never lose it. For a cause must be very "badly off, in which they could not get some witnesses to speak of sensible "actions. A reasonable action is an act—an interval is a state—The act of "reason may subsist with the habit of madness, and if it were not so, a state "of folly could never be proved." *Pothier's Treatise on the law of obligations, London*, 1806, *vol.* 2, *appendix* 19, *p.* 670, 671.

* Lord Eldon in a case that came before him on an application to supersede a commission of lunacy, said—"Unless the physician who swears "that he has frequently seen the prisoner, and thinks him of sound mind, "*can go further*, and says that he has examined the grounds of the opin- "ions of those medical gentlemen who thought otherwise, and the result "is, *that just and accurate as those conclusions were, or inaccurate upon his "own conclusion satisfactorily formed, the present state of the party is as "he represents it*—unless the affidavit comes with some such exposition, I "cannot try the truth of the reference. *Ex parte Holyland.*" 11 Vesey j'rs Reports, p. 10.

† Collinson on Lunacy, vol. 1, 657, 672. See also Starkie on Evidence, vol. 3, 1704.

"*good and evil, right and wrong, truth and falsehood* of his "belief, is that which as an intellectual being, renders him "different from other men and constitutes his distemper."* The delusion also under which many labour and which impels them to suicide or murder, shows little of the required knowledge. Lord Erskine, undoubtedly approached nearest to the solution of this difficult subject. "In cases of "atrocity (he observes) the relation between the disease "and the act should be apparent. As a doctrine of law, I "think the delusion and the act should be connected."†

Leaving the consideration of these points, and which I fear has proved tedious, I proceed to mention that the medical witness is often placed in a delicate situation from the circumstances under which he is summoned. He is a witness for one or other party—for the prosecution or for the prisoner; and he is so summoned in the belief that his evidence will favour the side by which he is produced.‡ It would be desirable, that at least the person who has made the previous examination before the coroner's jury, should be divested of this, so far as to enable him to give a full and fair statement of all the circumstances that make for either side. I am aware that he can now do so, and indeed his oath obliges him to it. He ought to put the judge and jury in possession of the "*whole truth*," even if he be not questioned to that extent.§ But often the technicalities of an examination and particularly by an adverse counsel, overcome that self possession which is so essential. Pressed by perplexing questions, and probably irritated in his feelings, he is apt to make declarations more strongly corrobo-

* Medical Jurisprudence of Insanity, by John Haslam, M. D. in Cooper's Tracts, p. 294, 302.

† Ibid. p. 318. In France, the subject of homicide committed by supposed maniacs, has excited much discussion within a year or two. Georget has written on it, and a work by Hoffbauer, a German lawyer, is also highly spoken of. I will add in this place, that Lord Eldon's introduction of the term *unsound mind*, as indicative of a state different from *lunacy* and *idiocy*, can only add to the number of synonimous terms, without producing any useful distinctions. His dictum as lord chancellor might give it currency, but it is not authorised even by the writings of English lawyers, and much less by medical experience. I speak now of it, as expressing a *particular* state of mental alienation. Some valuable comments on it will be found in the Edinburgh Med. and Surg. Journal, vol. 19, p. 613.

‡ Dr. Smith on Medical Evidence, p. 66.

§ Smith's Forensic Medicine, 1st edition, p. 8.

rative of opinions that he has formerly advanced, and as his examination advances, he may incur the charge of being *biassed*, more than facts will warrant.

Would not this difficulty be avoided by having the written report to which I have referred, presented to the court, as the *medical facts in the case?* The examiner before the coroner's jury will always have time to prepare this deliberately and cautiously—he can state in it his doubts, and mention the circumstances which are favorable or unfavorable to the accused person. *He can avoid all imputations of being a partisan*, and having once signed it as his deliberate opinion, he ought of course not to be allowed to alter or amend without showing the most satisfactory reasons.

We have now supposed the facts to be settled. The next difficulty that may occur is the difference of *opinion* that unfortunately too often arises in courts of justice between members of our profession. They disagree on the bearing and weight of certain facts and on the deduction to be drawn from them The most common cause of this, in my judgment, is the delivery of testimony, *viva voce*. That class of witnesses who are called upon to give opinions on a certain statement of facts, have generally been unable to examine it before the trial. They often hear it imperfectly, sometimes confusedly, and at all events, even if detailed in a succinct and clear manner, they have but a few moments to reflect on its various import, before they are called to decide upon its relevancy. Another circumstance must not be forgotten, and that is, the want of knowledge in one or the other witness. It is seldom that you can find any two persons who are equally skilled on a subject, and so it is here. *One is ignorant in comparison with the other.*

Both these would certainly be greatly obviated by having the written reports to which I have adverted as the basis on which they found their opinions. These could be examined with deliberation and the objections offered would then bear the impress of due reflection.

But allowing that all this could be effected, differences will still exist. How are these to be decided? The rule of law is applicable with proper explanations. "When a wit-"ness (says Starkie) testifies to a fact, which is wholly or "partially the result of reason upon particular circumstan-

"ces, it is obvious that the reasons of the witness for draw-
"ing that conclusion are of the most essential importance,
"for the purpose of ascertaining whether the conclusion
"was a correct one. And these observations apply with
"peculiar force to all questions of skill and science."*

If we carry out this principle, we shall find that all practitioners are not proper witnesses. In a case where anatomical knowledge is particularly necessary to elucidate the case, most importance should be attached to the opinion of him who has cultivated that science. When any question relating to the treatment or symptoms of disease is agitated, he should be consulted, whose opportunities are extensive and whose judgment is approved. So also with other departments of our science. The regrets of John Hunter are a lesson to all of us. Standing at the height of his profession, and to which he had been elevated by the force of genius alone, eminent as an anatomist and physiologist, he was summoned in 1780 as a witness on the remarkable trial of Captain Donellan, for poisoning his brother-in-law, Sir Theodosius Boughton. Although he evinced great knowledge, yet, says Sir Astley Cooper, "He regretted that he "had not made more experiments on the subject of poison, "before giving an opinion in a court of justice. He found "himself a good deal embarrassed, and he used to express "his regret publicly in his lectures, that he had not given "more attention to the subject before he ventured to give "an opinion in a court of justice."†

I need not enlarge in this place on the propriety of medical witnesses treating each other with respect. Even if opposed in sentiment, they may still express themselves with courtesy, and with a due regard to their respective reputations. If they do not guard these, others will with pleasure aid in the work of depreciation.‡

* Starkie on Evidence, 1. 460.

† Lancet, vol. 3, p. 171

‡ I quote two cases, one of which illustrates the *cruelty* which practitioners sometimes exercise towards each other, while the other is worthy of its excellent and kind-hearted narrator. "A surgeon had reduced a dislo-
"cation of a child's elbow, for which the father resisted payment, on the
"ground that the injury was merely a sprain, and that the charge was ex-
"cessive. To recover his fee, the practitioner brought an action. The

But *personal experience*, however comprehensive it may be, cannot always be satisfactory, nor indeed sufficient. It has then been a subject of considerable discussion whether *authority*, or in other words, the observations of others, should be adduced as testimony. There appears to be no settled rule on this subject, although certainly some judges have decided against its introduction. When Dr. Neale on the trial of Donnal for poisoning, quoted Thenard, whose work on chemistry is as much authority with physicians as

" ordinary medical attendant of the defendant's family *saw the arm on the* " *following day, accidentally, and in his opinion there was no dislocation.*"

" Sir Wm. Blizard who had already spoken in favour of the plaintiff's " character, and professional qualifications, was again examined upon this " point, and very properly discountenanced such an inference—stating that " it was *impossible for any one, after twenty-four hours,* to say whether a dis- " location had taken place or not, if it had been properly treated." *London Med. Repository*, 21, 264.

Mr. Abernethy states the following in his lectures. His characteristic manner would seem to be preserved in the report. " A medical man was " prosecuted for killing a child by giving it opium, at least that was said. " I happened to be in the country at the time, and was strongly solicited " by him to attend and give my opinion. I considered that the character " of the profession was at stake, and although rather against my inclina- " tion, I went. After waiting in a crowded court the greatest part of the " day, I was called upon, and placed in the witness box. The lawyers had " taken it into their heads that the child had died from maltreatment on " the part of the surgeon ; the child had been scalded severely, and he had " given opium, and they thought they should be able to make the jury " think as they did. The first question put to me was, " Mr. Abernethy, " will you inform us what is considered the proper treatment for scalds?" " This was a question broad enough to be sure ; I was puzzled a little how " to answer it ; I did not know but that they would require a lecture on " burns and scalds. I considered a minute, and then said, " That which " was adopted in the present case." Oh ! that was what they did not ex- " pect ; it was giving a turn to the case which they did not like. " You " have heard the evidence, have you not ?" Yes, but it is contradictory." " But judging from the evidence ?" " I have no right to judge, you may " judge if you please, or the jury may judge, but I shall not." " But I ask " you, for the information of the jury, your opinion respecting the opium, " whether you do not consider it too large a quantity for a child ?" " The " statements respecting the opium have been contradictory, but admitting " that the child had, as was said, eight drops immediately after the acci- " dent, and ten drops two hours after, I should say that the child had not " taken one drop too much." " But are you aware that the child had no " pain ?" " Yes, perfectly ; when the skin, or any other part of the body " is severely injured, the nervous system of the part is so affected that the " peculiar actions of the nerves on the brain or spinal marrow, by which " alone pain can be felt, do not take place. A man may have a serious inju- " ry inflicted by a mechanical cause, may have his leg smashed, and nearly " torn off in machinery, and yet feel little or no pain ; and we are in the " habit of giving, in such cases, wine and opium, not to act as a narcotic, " but to arouse the energies of the vital powers, and call them again into ex- " ercise , the nervous system has sustained a great shock, from which it re- " quires to be roused." The judge said, " that he understood it, he saw the " principle on which the treatment was founded, and had no doubt but it " was correct." " But my lord," said the counsel, " the child slept to " death." " So he may have appeared to sleep, but he would have done

Starkie and Phillips are with lawyers, Judge Abbot said, "We cannot take the fact from any publication; we cannot take the fact as related by any stranger."* So also on the famous trial of Spencer Cowper, when some of the witnesses referred to medical authors on the subject of drowning, it was objected to by the bench. The expostulation of Dr. Crell on this deserves repetition. "My Lord (said he) it must be reading, as well as a man's own experience, that will make any one a physician; for without the reading of books in that art, the art itself cannot be attained to. I humbly conceive, that in such a difficult case as this, we ought to have a great deference for the reports and opinions of learned men, neither do I see any reason why I should not quote the fathers of my profession in this case, as well as you gentlemen of the long robe, quote Coke upon Littleton in others."†

On the other hand, in order to show that the doctrine of exclusion is not fully established, I need only allude to the frequent mention made by judges themselves of the writings of Dr. William Hunter. Surely if these be authority, the works of other eminent men are equally so.

In this country, I believe, the objection has never been made. There is scarcely a case of any note, where medical testimony has been required, in which frequent reference has not been had to medical works. They are quoted and

"so if no opium had been given; it was the torpid state into which the nervous system had fallen which caused that appearance, and from which the child could not be roused." Here the business rested, the treatment was admitted to be correct, and the character of the gentleman exculpated." Lancet, vol. 6, p. 229.

In some cases, medical witnesses have met with deserved reproof. On the trial of Donnal, Mr. Ticknor, a surgeon, was asked, "Supposing a person to have retchings and purgings for several hours, and that you found these attended with a frequent and fluttering pulse, in that state of the illness, what should you have prescribed? *Ans.* I should have prescribed diametrically opposite to the prescription of Dr. Edwards. I should consider that prescribed by Dr. Edwards, as adding weight to a porter's back."

Mr. Justice Abbot to the witness: "Dont speak metaphorically: you are speaking just now of a gentleman of experience and respectability, I dont wish you to conceal your opinion, but only to speak it in different language." Paris and Fonblanque's Med. Jurisp 3. appendix, p. 304.

* Paris and Fonblanque, vol. 3. appendix, p. 299.

† Hargrave's State Trials. "It appears to us that no witness could follow this advice (to shun quoting authorities) without compromising the right and dignity of his profession, as well as the force of his evidence, for it would not be difficult to show that medical evidence altogether is little else than a reference to authority." Edinburgh M. & S. Journal, 19. 480. See also ibid. p. 610.

commented upon, by the bench, the bar, and the professional witnesses.

I must not refrain from mentioning, that the responsibility of the physician is often greatly increased by the mode of the examination. "A dexterous advocate (as has been well re-"marked) has a great advantage over any witness however "learned or self possessed. He may be led into a train of "admissions, the inferences from which are afterwards to "be turned against him."* Many of these undoubtedly originate from inquiries into the import of *individual facts*, instead of the *whole collectively*. The consequences of such attempts may be easily conceived. "In a vast majority of "cases, for example, in all cases of insanity, infanticide "and poisoning, the witness may be made to express the "very opposite of his real opinion."†

* Smith on Medical Evidence, p. 42.

† Edin. M. & S. J. 19. 611. The difficulties attending this have induced some to advise, that *no opinion* should be given, and to refuse it when asked. But I cannot see how an answer is to be evaded, except by pleading ignorance. Mr. Abernethy in the following case, says, he gave no opinion, but I should suppose that no one, after perusing it, could deny that he has given a *most decisive one for the prisoner*.

"The case was that of a *Lascar*, who had been struck with a *marlin* "*spike*, aboard ship, and he died; and then the question was, whether the "blow he had received with the marlin spike had killed him or not. When "I went into court, and after the evidence had been given with relation "to the transaction, the lawyer said to the judge, "My lord, Mr. Aber-"nethy is in court, and we will thank you to take his deposition now, as "we know his time is valuable; will you have the goodness to take it "now?" "Certainly." "Can you, sir, from what you have heard, form "an opinion as to whether the blow this Lascar received, was, or was not, "the cause of his death?" To which I answered, "My lord, there is no "evidence before this court, upon which medical opinion can or ought to "be founded." (Laughter.) "What, sir, dont you mean to give an opin-"ion at all?" "No." (Continued laughter.) "Why, sir, you were sent "for, for the purpose of giving an opinion." I told him I should not do it. "Then the party had a counsel, and he got up: "O, Mr. Abernethy," says "he, "it might have been the fever, you know, that destroyed this Las-"car? You are acquainted with those East India fevers, I believe?" "I "am not." (Laughter.) Then the counsel on the other side set at me, "and I just said, "After what I have told his lordship, I should be unwil-"ling to offer one word that could in any degree influence the minds of the "jury." Then the judge says, "But, indeed, this is very strange, sir; we "are to look to you for an opinion." "My lord," said I, "I am ready to "tell you, if you please, the grounds for what I have said to your lordship." "I should be very happy to hear them, sir." So he dipped his pen in the "ink, and I spoke deliberately that he might take it down! "In case of "death succeeding to injury, the medical evidence goes to prove, that the "subsequent death was, or was not, the effect of the preceding injury, by "showing that that injury had materially affected parts essential to life. "My lord, there's no evidence of this kind before the court." "Certainly "not," he said, and I was dismissed. (Laughter.) Now I did not tell them "that there was no evidence before the court on which the jury could

If the duties on which I have enlarged, are important to the community, in promoting the proper administration of justice, ought not the individuals engaged in them to receive adequate compensation? I advert to this, not only because it is just in principle, but because it would remove all imputations of volunteering in criminal cases. No one can refuse being a witness when legally summoned—every one I presume, may decline the dissection of a dead body, or the chemical examination of a suspected fluid. And yet there is not, I believe, an individual attending on any of our courts, who is not paid for his time and services, with the exception of such as are engaged in these investigations.†

With this, I conclude what I have to offer on the subject of MEDICAL EVIDENCE. Some of my suggestions may appear rash and speculative—others may be condemned as the result of ignorance. But if they elicit discussion and lead to improvement, I shall not have addressed you in vain.

Before taking leave of you, a brief notice of our medical annals during the last and present year, may not be improper.

I have the pleasure to state, that in compliance with the request of the society, made at its last meeting, the regents of the university have conferred the honorary degree of doctor of medicine on the gentlemen then nominated by us. This act deserves and doubtless receives your cordial thanks. You will also recollect that a delegate was appointed to attend a proposed medical convention at Northampton. I re-

" found an opinion, but that was the construction they put on it; and they " said, " Why, if Mr. Abernethy cannot form an opinion, we cannot;" " and as justice always leans to the side of mercy, the accused individual " was discharged. But it is a very awful situation in which you are placed; " and if you were to say, a blow from a marlin spike would not kill a Las- " car, you would say a very outrageous thing. Many of those Lascars " have been killed with a box of the fist, which a boxer here would laugh " at. They are what they call a *nash* sort of people, very susceptible of " injury; and if you were to say the blow had killed him, the other man's " life would be in jeopardy, though perhaps he had done nothing but what " he was perfectly justifiable in doing Then, I say, I would not give an " opinion in a court of justice: but if a juryman asks you a question, you " must answer; you should try, of course it belongs to you to try, not to " let his mind be too much prejudiced by the evidence in relation to the " fatal point."

† Smith on Medical Evidence, p. 29. By a late decision in Emgland (Severn *v.* Olive) the expenses of experiments to elucidate or determine points in disputes cannot be allowed in costs. This (says Dr. Paris) may be a check to prevent intelligent practitioners from attending.

gret that illness in his family prevented his attendance. Lastly, among the transactions of our last session, was a petition to the legislature, requesting that body to decide on the validity of diplomas, granted by other states to individuals pursuing their medical studies in schools within this state, not authorised by its laws. The regents, to whom the subject was presented, accorded in the necessity of an enactment, and the legislature, by large majorities, passed a law declaring them invalid.

When the passions and feelings of the present day shall have subsided, the justice of this law will be acknowledged by all. It will be even a matter of surprize that the right of a state to say who shall practice within its borders, should ever have been invaded, and particularly by the incorporations of a commonwealth, which most effectually prevents all similar encroachments.

During the adjourned session of the legislature held last autumn, the laws relative to the medical profession came before them in a revised form. With the details of those that were enacted, you are of course acquainted. As an individual, and I of course speak thus in all I may say, I beg to congratulate you on their adoption. They are calculated to elevate the character of the profession, and if mildly but efficiently administered, must conduce to the public good.* I forbear saying more on them, as the subject is still before you in a deliberate form. I cannot however do wrong in adding, that most of the provisions have from time to time been suggested by our society, and it would certainly seem proper that they be submitted to the test of experiment, before they be again changed.

It will afford you pleasure to be informed that our state medical institutions, have each increased in the number of their students since the winter of 1826–7, and that their prospects are flattering, provided they be not denied the countenance of the state. Forming part of the great system of education, which in regular gradation ascends from

* The Medical Profession in this state is under a deep debt of gratitude to Dr. Elial T. Foote, a member of the legislature of 1827, for his unwearied exertions in procuring the passage of the above law. I bear this testimony with the more pleasure, as, in common with many others, his character and conduct have been made the subject of foul-mouthed slander.

common schools to the highest literary and scientific instruction, they are with great propriety subjected to boards of control and trust, and regulated by the ordinances of those boards and the public laws. In return, the state has directed that attendance on the lectures delivered in these institutions shall form one of the requisites for obtaining a licence, and also that the regents of the university may confer the degree of doctor of medicine on such as comply with additional and more onerous requisitions. Thus you observe that the state has granted privileges to these institutions, founded by itself, but has guarded against their abuse, by organizing various bodies to supervise them. The legislature, emanating from the people, elect the regents of the university—the regents appoint the trustees and professors of the respective colleges. The students attending these colleges cannot obtain a licence without returning to the great body of the profession, represented by the county medical societies, or the medical society of the state—nor can they procure a doctorate, without appearing before the regents of the university and proving their compliance with the laws of the state and the ordinances of that board.

Certainly this system is properly guarded, and most undoubtedly it does not infringe on private rights. All and every one, both in and out of the profession, who feels himself qualified to engage in lecturing on the various branches of medical science, may freely undertake it—"There is none to molest him, or make him afraid." But as yet the state has not broken in upon its system of medical education. It has not yet granted state privileges to institutions not directly amenable to the various supervisory boards, emanating from its authority. If such should be the case hereafter, we may safely predict, that although the state colleges will be the first victims, the success of the others will be but ephemeral. Causes on which I need not enlarge may for a few years buoy up the institutions that are independent of those restraints, which for twenty years have been deemed wise and salutary, but they must fall. They will fall from internal dissension. They will fall, because the public will learn that unlicensed freedom ends in licentiousness.

In giving these views, I hope I have addressed you with the respect that is due to my situation and to yourselves. I

have not introduced attacks on private character, or on public bodies. I would not impugn the motives of any, who might differ with me, merely because they so differed—nor would I be so illiberal as from this place to insult individuals who are of course precluded from reply or vindication. I do not mean to be misapprehended or misunderstood, nor do I wish to say any thing which it may be necessary on some future occasion to explain.

There is but one point, on which I may be misjudged, and for which I must beg your indulgence. It may be asserted that I am too interested to be a competent judge. Be it so. It is but natural that those who have most at stake should be the earliest alarmed. Individuals however are mortal—they pass away and others fill their places. Institutions should be permanent. In a state which like New-York has earned and wears a proud wreath of civic glory, all must breathe the aspiration, THAT HER PROGRESS IN SCIENCE AND LITERATURE MAY BE COMMENSURATE WITH HER EXERTIONS, AND LASTING AS HER UNRIVALLED REPUTATION.